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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In The Matter of

THE PROVISION OF INTERSTATE AND
INTERNATIONAL INTEREXCHANGE
TELECOMMUNICATIONS SERVICE
VIA THE 'INTERNET' BY NON-
TARIFFED, UNCERTIFIED ENTITIES

RM No. 8775

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COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION

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SUMMARY

The Telecommunications Resellers Association ("TRA"), an organization consisting of more than 450 resale carriers and their underlying product and service suppliers, offers the following comments in response to the Petition for Declaratory Ruling, Special Relief, and Institution of Rulemaking filed by America's Carriers Telecommunication Association ("ACTA") urging the Commission, among other things, to "issue a declaratory ruling establishing its authority over interstate and international telecommunications services using the Internet . . . and [to] institute rulemaking proceedings defining permissible communications over the Internet."

TRA shares ACTA's concern regarding the common carrier provision of voice telephony and other basic telecommunications services over the Internet without benefit of regulatory certification and/or tariffs and, critically, without charge. Further, TRA agrees with ACTA that the Commission's jurisdiction extends, and should be applied, to such activities. While TRA does not support certain elements of ACTA's proposed solution to the problem so identified, it does endorse ACTA's request that the Commission (i) issue a declaratory ruling asserting jurisdiction over interstate and international voice telephony and other basic telecommunications services provided on a common carrier basis over the Internet and (ii) initiate a rulemaking proceeding to determine how best to exercise that jurisdiction.

In TRA's view, however, the rulemaking so initiated should address not the end result, as proposed by ACTA, but rather the underlying cause of the problem. The principal harm arising from the common carrier provision of voice telephone and other basic telecommunications services over the Internet -- i.e., the ability to provide these services at little or no charge -- flows directly from the exemption from interstate switched access charges

currently enjoyed by enhanced service providers ("ESPs"). TRA submits that this problem is best addressed by reforming the Commission's existing access structure to remove all excess costs from, as well as to eliminate all subsidies historically embedded in, interstate switched access charges and by then applying these rationalized access charges to all interstate/international telecommunications service providers, including ESPs.

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The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.405(a) of the Commission's Rules, 47 C.F.R. § 1.405(a), hereby replies to the Petition for Declaratory Ruling, Special Relief, and Institution of Rulemaking ("Petition") filed by America's Carriers Telecommunication Association ("ACTA") on March 4, 1996, and assigned Rulemaking No. 8775. In its Petition, ACTA urges the Commission, among other things, to "issue a declaratory ruling establishing its authority over interstate and international telecommunications services using the Internet . . . and [to] institute rulemaking proceedings defining permissible communications over the Internet." As set forth in greater detail below, TRA agrees with ACTA that the Commission's jurisdiction extends to the transmission of voice telephony and other basic interstate and international telecommunications services offered on a common carrier basis irrespective of the medium of transmission and

supports ACTA's request for issuance of a declaratory ruling asserting jurisdiction over, and for initiation of a rulemaking to determine the extent to which the Commission should regulate, the provision of such services via the Internet.

I

INTRODUCTION

TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect the interests of entities engaged in the resale of telecommunications services. TRA's more than 450 members are all engaged in the resale of interexchange, international, local exchange, wireless and/or other services and/or in the provision of products and services associated with such resale. Employing the transmission, and often the switching and other capabilities of underlying facilities-based carriers, TRA's resale carrier members create "virtual networks" to serve generally small and mid-sized commercial, as well as residential, customers, providing such entities and individuals with access to rates otherwise available only to much larger users. TRA's resale carrier members also offer small and mid-sized commercial customers enhanced, value-added products and services, often including sophisticated billing options, as well as personalized customer support functions, that are generally reserved for large volume corporate users.

While TRA's resale carrier members range from emerging, high-growth companies to well-established, publicly-traded corporations, the bulk are not yet a decade old. Nonetheless, TRA's resale carrier members collectively serve millions of residential and commercial customers and generate annual revenues in the billions of dollars. The emergence and dramatic growth of

TRA's resale carrier members over the past five to ten years have produced thousands of new jobs and myriad new business opportunities. In addition, TRA's resale carrier members have facilitated the growth and development of second- and third-tier facilities-based long distance providers by providing an extended, indirect marketing arm for their services, thereby further promoting economic growth and development. And perhaps most critically, by providing cost-effective, high quality telecommunications services to the small business community, TRA's resale carrier members have helped, and are helping, other small and mid-sized companies to grow their businesses and generate new jobs.

TRA shares ACTA's concern regarding the common carrier provision of voice telephony and other basic telecommunications services over the Internet without benefit of regulatory certification and/or tariffs and, critically, without charge, and agrees with ACTA that the Commission's jurisdiction extends, and should be applied, to such activities. While TRA does not support certain elements of ACTA's proposed solution to the identified problem, it does endorse ACTA's request that the Commission (i) issue a declaratory ruling asserting jurisdiction over interstate and international voice telephony and other basic telecommunications services provided on a common carrier basis over the Internet and (ii) initiate a rulemaking proceeding to determine how best to exercise that jurisdiction.

In TRA's view, however, the rulemaking so initiated should address not the end result, as proposed by ACTA, but rather the underlying cause of the problem. The principal harm arising from the common carrier provision of voice telephone and other basic telecommunications services over the Internet -- i.e., the ability to provide these services at little or no charge -- flows directly from the exemption from interstate switched access charges currently enjoyed by enhanced service providers ("ESPs"). TRA submits that this problem is best

addressed by reforming the Commission's existing access structure to remove all excess costs from, as well as to eliminate all subsidies historically embedded in, interstate switched access charges and by then applying these rationalized access charges to all interstate/international telecommunications providers, including ESPs.

II.

ARGUMENT

A. The Commission's Jurisdiction Extends To Interstate And International Voice And Other Telecommunications Services Provided On A Common Carrier Basis Via The Internet

As ACTA correctly points out, the Commission's jurisdiction extends to "all interstate and foreign communication by wire or radio . . . which originates and/or is received within the United States, and to all persons engaged within the United States in such communication . . ."¹ While the Commission has elected not to exercise this jurisdiction in certain limited circumstances -- e.g., with respect to enhanced services² -- it nonetheless retains the authority to do so. And the Commission has always regulated the provision of voice and other basic telecommunications services provided on a common carrier basis.

The Internet is a unique "cell-based" network comprised of more than 70,000 individual private, public, commercial and educational networks, 35,000 of which are located in the United States and all of which are seamlessly combined to provide international connectivity.

¹ 47 U.S.C. § 152(a).

² Amendment of Sections 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (1980), *recon.* 84 F.C.C.2d 50 (1980), *further recon.* 88 F.C.C.2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C.Cir. 1984), *cert. denied sub nom. Louisiana Public Service Commission v. FCC*, 461 U.S. 938 (1983), *further recon.* FCC 84-190 (released May 4, 1984) (collectively, the "Computer II Decisions").

A data communications network, the Internet provides for packet switched data transmission and supports the synchronous X.25 interface, among other, protocols. Given that terminal equipment utilized to originate and terminate communications over the Internet often employ asynchronous protocols used to originate and terminate traffic over ordinary voice lines and generally have not been designed to support the X.25 protocol, protocol conversion is required to permit communication between terminals and networks. This protocol conversion function is performed by Internet access providers. And given that protocol conversion is an enhanced service, Internet access providers are treated as ESPs for federal regulatory purposes and hence are not regulated.³

TRA submits that while voice telephony provided over the Internet thus conceivably could be classified as enhanced under the Commission's rules, such an approach would elevate form over substance. Although the delivery of voice telephony over the Internet requires protocol processing, no enhanced value is being added thereby; the service provided is still basic voice telephony. Accordingly, voice telephony over the Internet should be regulated no differently than voice telephony over the public switched telephone network. As the Commission has recognized, at least in spirit, protocol conversions that are used "merely to facilitate provision of an overall basic service" should be treated as basic, not enhanced, services.⁴

Such an approach would be analogous to the manner in which the Commission determines the jurisdictional nature of a call. The Commission has long held that the routing of

³ 47 C.F.R. § 64.702; Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 2 FCC Rcd. 3072 (1987), *recon.* 3 FCC Rcd. 1150 (1988), *further recon.* 4 FCC Rcd. 5927 (1989), *rev'd on other grounds sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990), *on remand* 6 FCC Rcd. 7571 (1991), *vacated in part and remanded California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (collectively, the "Computer III (Phase II) Decisions").

⁴ Independent Data Communications Manufacturers Association, Inc.: Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service is a Basic Service, 10 FCC Rcd. 13717, ¶¶ 11-18 (1995) (*citing the Computer III (Phase II) Decisions*).

a call is irrelevant to its jurisdictional classification; it is the points at which the call originates and terminates that are determinative.⁵ Hence, a call originating in Los Angeles and terminating in San Francisco will be deemed to be an intrastate call even though it is routed through New York City; "[s]imply put, jurisdiction turns on the nature of the communications, rather than the location of the facilities links through which they pass."⁶ In other words, substance, not form, governs.

Under this approach, an entity that holds itself out as a provider of voice telephony over the Internet should be required to obtain all necessary Section 214 authority and to file all appropriate tariffs. Such an entity should also be treated as a common carrier subject to all applicable Title II regulations in its provision of voice and other basic telecommunications services over the Internet.⁷ A more difficult issue arises when an Internet access provider does not affirmatively hold itself out as a provider of voice telephony services. TRA submits that in such a circumstance, the Internet access provider should be required, to the extent possible, to block use of its access facilities for at least voice telephony and in the event that it is unable or unwilling to do so, should be required to obtain all necessary certifications and to file all appropriate tariffs.⁸

⁵ American Telephone and Telegraph Company and the Bell System Operating Companies: Restrictions on the Resale and Sharing of Switched Services Used for Completion of Interstate Communications, 94 F.C.C.2d 1110, ¶ 8 (1983), *aff'd sub nom. National Association of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095 (D.C.Cir. 1984), *cert. denied* 469 U.S. 1227 (1985).

⁶ *Id.*

⁷ The Commission has long held that "entities that offer both interexchange services and enhanced services are treated as carriers with respect to the former offerings, but not with respect to the latter." Northwestern Bell Telephone Company Petition for Declaratory Ruling, 7 FCC Rcd. 5644, ¶ 5 (1992).

⁸ TRA believes that the Commission can reach only Internet access providers in exercising its jurisdiction and cannot direct the actions of software providers.

B. The Commission Should Eliminate All Excess Costs From, As Well As All Subsidies Historically Embedded In, Interstate Access Charges And Thereafter Eliminate The Access Charge Exemption Currently Afforded Enhanced Service Providers

As noted above, simply ensuring that all providers of voice telephony and other basic telecommunications services over the Internet are subject to certification and tariffing requirements and Title II regulation addresses only one aspect of the overall problem identified by ACTA. Perhaps the most critical concern voiced by ACTA is the current ability of Internet access providers to provide voice telephony and other basic telecommunications services at no, or minimal, charge. Such pricing opportunities arise not from competition, but from exploitation of the exemption from interstate switched access charge currently afforded ESPs.⁹ And the ESP access charge exemption has survived only because access charges continue to be inflated by excess costs and historically embedded subsidies. To address this concern, the Commission's access charge structure must be reformed and thereafter the ESP access charge exemption should be eliminated.

As the Commission recognized in CC Docket No. 87-215, the exemption afforded ESPs from interstate access charges in 1983 was intended to be "temporary," designed to avoid unduly burdening the then fledgling ESP industry and disrupting the provision of information services to the public.¹⁰ In 1987, the Commission proposed to eliminate the ESP access charge exemption, later explaining:

⁹ Rather than interstate access charges, ESPs currently pay local business rates and interstate subscriber line charges for their switched access connections to local exchange carrier central offices and special access surcharges for private lines.

¹⁰ Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd. 2631, ¶ 2 (1988).

[W]e expressed concern that the charges currently paid by enhanced service providers may not contribute sufficiently to the costs of the exchange access facilities they use in offering their services to the public. We observed that to the extent enhanced service providers are exempt from switched access charges, other users of exchange access are forced to bear a disproportionate share of the local exchange costs that access charges are designed to cover.¹¹

The Commission also voiced concerns regarding "the discriminatory aspects of the access charge exemption for enhanced service providers," as well as the incentives created by the exemption for ESPs to utilize network facilities inefficiently.¹²

All of these concerns apply with equal or greater force today; indeed, the availability of voice telephony and other basic telecommunications services over the Internet greatly exacerbate concerns regarding discrimination, adding a competitive element to an otherwise equitable construct. Unfortunately, the principal reason that the Commission declined to eliminate the ESP access charge exemption still exists today. Given the inflated level of interstate switched access charges, the Commission has repeatedly expressed concern regarding the adverse impact that imposition of such charges on ESPs would have on the availability and the affordability of enhanced services. As the Commission explained in 1988:

[T]he imposition of access charges at this time is not appropriate and could cause such disruption in this industry segment that provision of enhanced services to the public might be impaired.¹³

Interstate switched access charges contain a number of historically embedded subsidies. Included among the subsidies that are built directly into the access charge structure are the Carrier Common Line Charge ("CCLC"), the Long Term Support ("LTS") program, the

¹¹ *Id.*

¹² *Id.* at ¶¶ 2, 19.

¹³ *Id.* at ¶ 17; *see also* Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd. 4524, ¶¶ 544-65 (1991).

Dial Equipment Minutes ("DEM") weighting subsidy and the Residual Interconnection Charge ("RIC").¹⁴ Moreover, access charges are still inflated by residual excess costs left over from the days of rate-of-return regulation. It has been estimated that telephone subsidies, which are largely funded by interstate switched access charges, range as high as \$20 billion.¹⁵ Indeed, interstate switched access charges generally are believed to recover roughly three times the cost of providing originating and terminating access.¹⁶

Under Section 254(e) of the Telecommunications Act of 1996 ("96 Act"), funding for universal service support must be "explicit."¹⁷ Accordingly, subsidies may no longer be embedded in interstate switched access charges; they must be recovered through some form of direct assessment. For this reason, TRA, in its comments in CC Docket No. 96-45, proposed to replace the CCLC, the RIC, DEM weighting and LTS with a single universal service support funding mechanism.¹⁸ Indeed, the Commission itself questioned whether the CCLC, including LTS, should be eliminated in implementing the universal service mandates set forth in the '96 Act.¹⁹

¹⁴ Common Carrier Bureau, Federal Communications Commission, Preparation for Addressing Universal Service Issues: A Review of Current Interstate Support Mechanisms (Feb. 23, 1996).

¹⁵ "Phone Service Subsidies Cost \$17.5 Billion, Study Says," Telecommunications Reports, Vol. 61, No. 2, p. 32 (Jan. 16, 1995).

¹⁶ See, e.g., NYNEX Ex Parte Presentation in CC Docket No. 96-45, submitted March 25, 1996); Pacific Telesis Ex Parte Presentation in CC Docket No. 96-45, submitted August 11, 1995).

¹⁷ 47 U.S.C. §254(e).

¹⁸ Comments of TRA in CC Docket No. 96-45, pp. 11-14 (filed April 12, 1996).

¹⁹ Federal-State Joint Board on Universal Service (Notice of Proposed Rulemaking), CC Docket No. 96-45, FCC 96-93 ¶ 114 (1996).

It is a fortuitous time for the issue of the disparate access charge treatment of voice telephony and other basic services over the Internet to come to the fore because the Commission has announced that it will soon be initiating a rulemaking to reform its current access charge regime, and as noted above, is already engaged in determining how best to fund its universal services support mechanism in the future. Moreover, voice telephony over the Internet is still somewhat primitive. While higher quality, more convenient applications are in the pipeline, the ability to deploy interoperable Internet voice applications on any scale is likely at least two to three years away. Accordingly, there is sufficient time for the Commission to reform its access charge regime, eliminating the excess costs and the subsidies, and to terminate the ESP access charge exemption before the provision of voice telephony and other basic telecommunications services via the Internet adversely impacts other providers of interexchange telecommunications services on a broad scale.

III.

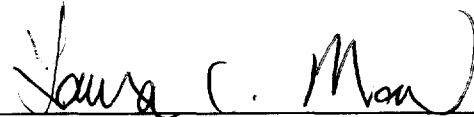
CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to grant the Petition for Declaratory Ruling, Special Relief, and Institution of Rulemaking filed by America's Carriers Telecommunication Association to the extent consistent herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeannine Greene, hereby certify that on this 8th day of May, 1996, copies of the foregoing document were sent by first class, United States mail, postage prepaid to the following:

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